

Misc. Docs - Meridian V. Gates

For the Ninth Circuit

MERIDIAN INTERNATIONAL
LOGISTICS, INC., a Nevada
Corporation,

Plaintiff and Appellant,

vs.

THOMAS G. GATES,

Defendant and Respondent.

APPEAL FROM

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

APPELLANT'S OPENING BRIEF

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Attorneys for Appellant,

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CLCW 1M15-01

No. 90-55281
CV 89-4383 RG (KX)

United States Court of Appeal

For the Ninth Circuit

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CLICWIMD-01

CERTIFICATE AS TO INTERESTED PARTIES

MERIDIAN INTERNATIONAL
LOGISTICS, INC., a Nevada
Corporation, *Appellant*

VS.

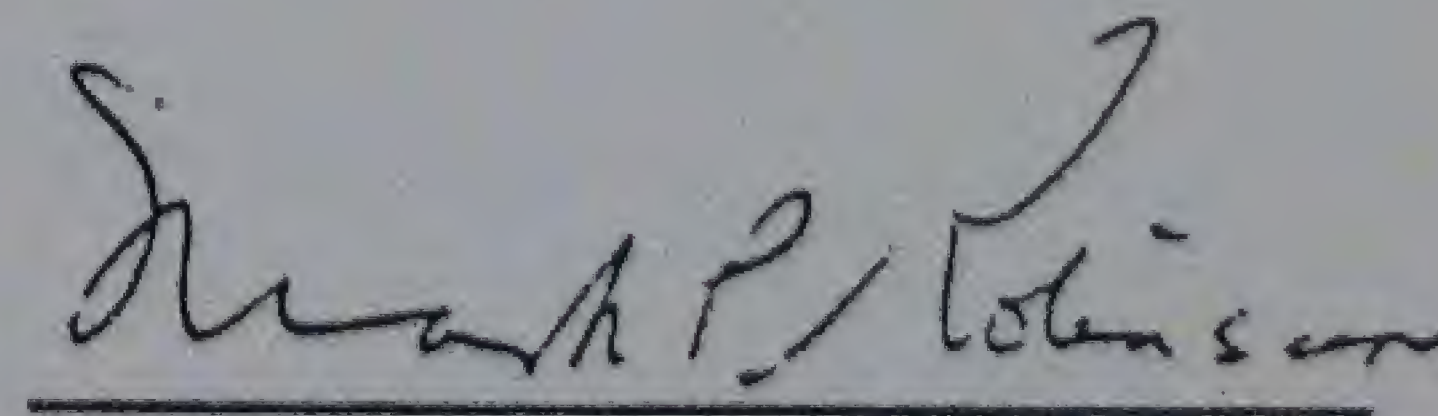
THOMAS G. GATES, *Respondent*

APPEAL FROM
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF THE STATE OF CALIFORNIA
HONORABLE RICHARD A. GADBOIS, JR., JUDGE

CERTIFICATE REQUIRED BY CIRCUIT RULE 28-2.1

The Attorney of Record for MERIDIAN INTERNATIONAL LOGISTICS, INC., certifies that there are no known interested parties other than those participating in this appeal.

Dated: June 27, 1990


MARK P. ROBINSON

ISSUES PRESENTED

The following brief will not be presented as a "normal" brief. It is difficult to determine how to frame the appeal in this case since it is the government's position that appellant's counsel should never have the opportunity to review any of the evidence submitted and upon which the District Court relied in dismissing the action. Assuming the ex parte in camera procedure suggested by the government and adopted by the District Court is valid, whatever view appellant will have of the evidence submitted will have to be through the eyes of this Court of Appeals. Accordingly, appellant would ask this Court to view the ex parte submission with the following questions in mind:

1. Appellant submitted testimony that direct contact of a foreign national or a foreign police force to initiate an inquiry by a Special Agent of the Los Angeles office was contrary to established department policy. C.R. 15, p. 33:12-14. Is there evidence that a reversal of this policy was made after Mr. Gunderson left the FBI? Is there evidence that Special Agent GATES was not initiating an inquiry?¹ If contact was made in contravention of existing policy but

¹ If so, plaintiff represents to this Court that it can produce evidence that GATES actually initiated several of the inquiries.

at the direction of GATES' superior, isn't contact still outside the scope of employment?

2. There is direct evidence that disclosing confidential information to outside authorities concerning an on-going investigation event to other police agencies is prohibited by FBI procedure. C.R. 15, p. 33:16-18. Is there evidence that FBI procedure in this regard has been changed and that a Special Agent may advise a foreign police force or foreign national that the FBI investigation has revealed a \$500 million "share fraud," a Sydney based confidence scheme in 1982, and that officers of MIL were involved with the Mafia and Yakuza, is now allowed? Even if contact is now allowed shouldn't defamatory statements made in contravention of long established policy be viewed as ultra vires and made outside the course and scope of employment?

3. The government provided appellant no legal authority either for ex parte submission of the evidence it was relying on or in camera inspection of the ex parte submission and

STATEMENT OF THE CASE

A. PRELIMINARY JURISDICTIONAL STATEMENTS

The District Court had removal jurisdiction under 28 U.S.C. §2679(d)(2) and had jurisdiction to hear the Motion to Dismiss under 28 U.S.C. §1331 and Federal Rule of Civil Procedure 12(b)(1) and (6). This Court has jurisdiction under 28 U.S.C. §1291 because the District Court's Order of Dismissal is a final decision. The Order Of Dismissal is appealable under 28 U.S.C. §1291. *Flood v. Harrington* (9th Cir. 1976) 532 F.2d 1248. The Notice of Appeal was timely as it was filed within the sixty (60) day time period as properly extended by the District Court under Federal Rule of Appellate Procedure 4(a)(5). Appellants do not seek attorneys fees for this appeal.

B. NATURE OF CASE

This is a lawsuit wherein the plaintiff alleges it was defamed by defendant and that defendant interfered with the prospective advantage of plaintiff. The complaint in this case was filed in the Los Angeles Superior Court of the State of California on June 16, 1989. It alleges as follows:

Meridian International Logistics, Inc. (hereinafter "MIL") is a Nevada corporation which has its primary place of business in Los Angeles. It does extensive business overseas, especially in Australia and Japan. MIL is engaged in the funding and support of extensive medical research and technologies, the marketing of a low

cost earth removal system, and is the holder of 100% of the stock of MERIDIAN ARMS CORPORATION (hereinafter "MAC").

Shortly before February 10, 1989 THOMAS GATES (hereinafter "GATES") directly contacted and published to the Australia Federal Police in Canberra, Brisbane, and Cairns, Queensland, Australia, and other foreign nationals in Innisfail, Queensland, Australia, other foreign nationals in Brisbane, Queensland Australia and to an individual in Tokyo, Japan, false and defamatory statements, to wit:

1. That MIL was guilty of a \$500,000,000.00 "share fraud";
2. That MIL and officers of MIL had participated in a "Sydney based confidence scheme in 1982"; and
3. That MIL and officers of MIL were involved with the Gambino crime family (the "Mafia") and the Yakuza.

These statements were false and known by GATES to be false when made. GATES is alleged to be an employee of the Federal Bureau of Investigation (hereinafter, the "FBI"). However, paragraph four of the complaint alleged as follows:

"Gates was not acting within the general scope of his authority, acted completely outside his authority, performed acts were not permitted by his duties, and intentionally inflicted injury on the Plaintiff."

In its Reply Memorandum served September 15, 1989, the government conceded the District Court had jurisdiction to review the course and scope determination of the United States Attorney. The government sought to have the District Court review the evidence lodged ex parte and under seal in camera and affirm the United States Attorney's factual determination based upon a review of the evidence. The government further urged that no discovery should be allowed because of its in camera showing.

Thus, the government was now grounding its Motion to Dismiss entirely on the factual showing set forth in the "Declarations And Documents In Support Of Reply Memorandum An Ex Parte Application." However, the government never served appellant with any of the "declarations and documents" upon which it relied and never served appellant with any document purporting to set forth the authority for what had no become, in essence, an in camera ex parte Motion to Dismiss under FRCP 12(b)(1) and (6). No reason was ever provided to MIL's counsel as to why the documents were submitted under seal. There was some reference to covert investigation in the Court's comments at the hearing:

"I don't know, if this investigation was so covert, how did the plaintiff learn about it?" R.T. 4:7-8.

MIL filed written objections to this ex parte procedure on the grounds that it was highly irregular, violative of the local rules and deprived appellant of adequate notice and a meaningful opportunity to be heard. Although unaware of the

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Attorneys for Appellant,
MERIDIAN INTERNATIONAL LOGISTICS, INC.

AFFIDAVIT IN SUPPORT OF APPLICATION

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I, Thomas G. Gates, being first duly sworn, depose and say:

I

INTRODUCTION TO INVESTIGATION:

1. I am a Special Agent (SA) for the Federal Bureau of Investigation (FBI). As such, I am an "investigative or law enforcement officer...of the United States" within the meaning of Title 18, U.S. Code, Section 2510(7), that is, I am an officer of the United States, who is authorized by law to conduct investigations of, and make arrests for, the offenses enumerated in Title 18, U.S. Code, Section 2516.

2. I have been a SA of the FBI for the past 10 1/2 years. Since 1981 I have been involved in the investigation of organized criminal activities. I have been involved in approximately 18 cases involving electronic surveillance, and I have been the agent in charge. During the past year, I have intercepted communications and participated in physical surveillance of individuals, and directed investigations. I have spoken with numerous other law enforcement officers who have special expertise in the investigation of racketeering and stock frauds. Through my experience and training, my contacts with investigators who have experience in labor racketeering and stock fraud investigations, my debriefing of informants and other individuals knowledgeable about these matters, and my own

EXHIBIT C

Los Angeles

In Los Angeles, California, the F.B.I. is investigating whether Martin Bacow, also known as William Martin, Frank Harris, Frank Walters and Frank Price, Jr., through his influence with Teamsters General President Jackie Presser and local Teamsters officials involved in the entertainment industry, is performing or causing to be performed certain labor favors in exchange for money or other thing of value, and whether Bacow is threatening strikes and/or causing strikes so as to extort money or other thing of value from movie and television production companies. Violations of Title 18, United States Code, Section 371 and 1951, and Title 29, United States Code, Section 186 are suspected in this matter.

Additionally, agents are investigating whether Angelo Commito is offering Bacow a kickback or other thing of value in return for Bacow using his influence with the Teamsters to guarantee the selection of benefit plans represented by Commito. Violations of Title 18, United States Code, Sections 664, 1341, 1343, 1954 and 371 are suspected in this matter.

Michael Del Gaizo, Russell J. Massetta, Eugene Frank Giaquinto, James Anthony Santangelo, Earl Bush, and Michael Rudy Tham are also subjects in these investigations.

Agents are investigating whether Detective John St. John, assigned to the Organized Crime Intelligence Division of the Los Angeles Police Department, is obstructing the administration of justice by revealing information concerning investigations being conducted by various federal, state, and local law enforcement.

This instrument is a true and correct copy of the original on file in my office
ATTEST:

WILLIAM L. WHITTAKER
Clerk, U. S. District Court
Northern District of California

By *Betty Taitman*
Deputy Clerk

Dated DEC 9 1988

agencies to Martin Bacow. Violation of Title 18, United States Code, Section 1503 and 1510 are suspected.

Agents are investigating whether Bacow, Angelo Commito, Edward Sciandra and Michael Del Gaizo are using extortionate practices to ensure that Eugene Giaquinto retains his position as the president of Home Entertainment for MCA/Universal, Inc. Giaquinto has awarded a twelve to fifteen million dollar a year contract to Northstar Graphics (operated by Del Gaizo) in New York. Violations of Title 18, United States Code, Section 1951 are suspected.

Agents are investigating whether Martin Bacow, Eugene Giaquinto, Robert Nichols, and others as yet unknown are obstructing the due administration of justice and conspiring to do so. Agents of the FBI are seeking to determine the source or sources of confidential information relating to a pending federal grand jury investigation and a federal indictment awaiting trial and the manner in which this information is disseminated to Bacow and Giaquinto. Violations of Title 18, United States Code, Sections 371 and 1503 are suspected.

Agents of the FBI are investigating whether Martin Bacow, Eugene Giaquinto, Joseph Garofalo, Robert Nichols and others as yet unknown are buying and/or selling stocks by the use of manipulative or deceptive practices. Violations of Title 18, United States Code, Sections 371 and 1343 and Title 15, United States Code, Section 78j are suspected.

Agents of the FBI are investigating whether Eugene Giaquinto, Joseph Garofalo and others as yet unknown are engaged in the sale

1 55. At 5:32 p.m., on March 30, 1987, ANGELO T. COMMITO called
2 telephone number (301) 363-3225 and spoke with ALAN COHN. COHN
3 asked COMMITO about Connecticut and COMMITO told him the
4 regulations were too tight. COMMITO told COHN that he was getting
5 close to a deal with Illinois Bell and that he had something for
6 COHN in New York. COMMITO asked about the deal with John LaFrance.
7 COMMITO told COHN that he gave some deals to Dr. Barry Kramer and
8 made a few bucks on it through Ron Fox. COHN told COMMITO that he
9 was going to Hawaii in a few weeks for SANCHEZ's deal.

10 56. It is your affiant's belief that paragraph 55, supra,
11 concerns the addition of ALAN COHN's dental, vision and health care
12 employee benefit plans to Local #5, H.E.R.E., in Honolulu, Hawaii,
13 along with the selling of the union employee's names for profit.
14 In addition, it is your affiant's belief that these conversations
15 are the basis for kickbacks to be paid to Anthony (Tony) Rutledge,
16 Financial Secretary/Treasurer of Local #5, H.E.R.E., Honolulu,
17 Hawaii, FREDDY F. SANCHEZ, and ALAN S. COHN. It is your affiant's
18 belief that the foregoing represent conversations involving
19 potential violations of Title 18, United States Code, Sections 371,
20 664, 1343 and 1954.

21 57. At 5:37 p.m., on March 12, 1987, ANGELO T. COMMITO called
22 telephone number (818) 777-4302 and spoke with Gene Giaquinto.
23 They discussed the movie business. COMMITO said he was interested
24 in a song that was submitted to Giaquinto. Giaquinto said that he
25 got a call from Miami and the guy that spoke to him made up some
26 lie about Frank. They talked about someone named Eddie who wanted
27 to come out and talk to the "giant." COMMITO cautioned Giaquinto
28 not to be there.

I certify that the annexed
document is a true and correct copy
of the original on file in my office.

WILLIAM L. WHITTAKER
Clerk, U. S. District Court
Northern District of California

by *Billy T. Inglish*
Deputy Clerk

DEC 2 1988

1 58. At 8:31 p.m., on March 12, 1987, ANGELO T. COMMITO called
2 telephone number (312) 698-9063 and spoke with Tommy Matassa.
3 COMMITO told Matassa that he had a phone call from DePaulo that
4 day. COMMITO said that he talked to Marty (Bacow) who was going to
5 talk to Don Joe, the "Fat Guy" who used to own the Chez Paris in
6 Chicago. COMMITO told Matassa that their contact at MCA Universal
7 is Gene Giaquinto. COMMITO said that Dino and he were involved in
8 a beef in Chicago. COMMITO said that he thought Dino should be
9 iced. COMMITO told Wire that he was going to see Tony Parisi in
10 New York next week. COMMITO stated that Marty (Bacow) was making
11 the movie and Giaquinto was going to distribute it. COMMITO said
12 that Dominic DePaulo had a local in Puerto Rico, the Leather
13 Workers.

14 59. At 8:54 p.m., on March 12, 1987, ANGELO T. COMMITO called
15 telephone number (818) 760-3897 and spoke with Marty Bacow.
16 COMMITO said that he was disappointed with "RUDY" (THAM). They
17 discussed the movie casting business, and film making. They talked
18 about Norman Green getting jobs for retirees. They talked about
19 some guy that Gene Giaquinto wanted to cast in a part. Bacow said
20 that THAM was insecure and that nothing he had touched outside the
21 union had worked. COMMITO said that he did not know how to make it
22 work. Bacow said that he was just not "ring wise."

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1 60. At 10:37 a.m., on March 13, 1987, ANGELO T. COMMITO
2 called telephone number (818) 777-4302 and spoke to an unidentified
3 female. COMMITO asked to speak with Gene Giaquinto. COMMITO was
4 told that Giaquinto was out. COMMITO told the unidentified female
5 that he had done a favor for the "old man." The unidentified
6 female told COMMITO that Giaquinto could be contacted at (305)
7 987-3580.

8 61. At 10:41 a.m., on March 13, 1987, ANGELO T. COMMITO
9 called telephone number (305) 457-8111 and spoke to an unidentified
10 female. COMMITO asked for Ed Sciandra, but was told by the
11 unidentified female that Sciandra was not registered as a guest at
12 the Diplomat Hotel. COMMITO then asked for Michael Del Gaizo's
13 room but there was no answer. COMMITO left a message for Del Gaizo
14 to ask Sciandra to call COMMITO.

15 62. At 7:06 p.m., on March 27, 1987, ANGELO T. COMMITO called
16 telephone number (818) 777-4302 and spoke with Gene Giaquinto.
17 COMMITO asked Giaquinto if he wanted those guys to come. Giaquinto
18 told COMMITO yes, and that the meeting would be on Thursday at
19 11:00 a.m. COMMITO told Giaquinto that Bert (Kaufman) wanted to
20 buy something so there was more to the meeting than just that.

21 63. At 2:52 p.m., on March 28, 1987, ANGELO T. COMMITO called
22 Marty Bacow in Los Angeles, California. Bacow told COMMITO that he
23 spoke with the president of the New World Company and things were
24 moving along. COMMITO told Bacow that he wanted him to meet
25 ELLIOTT KUSEL.

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1 64. It is your affiant's belief that paragraphs 57-63, supra,
2 concern ANGELO T. COMMITO, Marty Bacow, and Gene Giaquinto trying
3 to set up a deal concerning the production of a movie and various
4 home entertainment videos.

5 65. Your affiant's review of the copies of the
6 contemporaneous logs and tape recordings of intercepted
7 conversations and reports prepared by other Special Agents of the
8 Federal Bureau of Investigation, disclose that the following wire
9 interceptions on telephone number (415) 797-0124 occurred on the
10 indicated dates.

11 66. At 10:04 p.m., on March 18, 1987, Diana Sanchez received
12 a telephone call from FREDDY F. SANCHEZ. FREDDY said that the
13 merger was going to be approved. FREDDY wanted to know if Diana
14 needed a panel doctor under the Bakersfield plan. FREDDY said that
15 he was leaving for Hawaii on April 2, 1987. FREDDY said that Tony
16 Rutledge told him that they have negotiated a new contract for a
17 "30 percent increase." FREDDY told Diana that he planned to leave
18 Hawaii on April 5, 1987. FREDDY said that he spoke with Rutledge
19 that day and Rutledge was very excited about his new contract.
20 FREDDY said that Rutledge wanted him to call ALAN (COHN) and make
21 arrangements to go to Hawaii with him. FREDDY said he had to call
22 Rutledge back after he contacts COHN. FREDDY stated that he
23 planned to see Jackie Presser in the last week in March and then go
24 to Hawaii on the second of April with Dick Helfinger and come back
25 on the 5th. FREDDY told Diana that he planned to go back to Hawaii
26 on April 9th with ALAN COHN to meet with Rutledge.

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28 / / /

1 coming in next week for a meeting with the meat cutters. COMMITO
2 told Velano that he would like to stop by his office on Friday.
3 Velano said that he would like to show COMMITO what he's been doing
4 on dental.

5 94. At 8:24 a.m., on August 31, 1987, Colleen Commito
6 received a call from Marty Bacow. Bacow said that he had spoken
7 with Giaquinto about COMMITO's meeting with Sciandra. Bacow said
8 he would call ANGELO COMMITO that evening.

9 95. At 6:59 p.m., on August 31, 1987, ANGELO COMMITO received
10 a call from Marty Bacow. They discussed COMMITO's meeting with
11 Sciandra. COMMITO said that he wanted to talk to him about a guy
12 out here. Bacow said "they" monitor Sciandra's every move. Bacow
13 asked if Sciandra mentioned Giaquinto. COMMITO said that Sciandra
14 thought Giaquinto "went Hollywood" on him and that Sciandra is
15 upset with Giaquinto. Bacow said his guy told him to get ahold of
16 Giaquinto right away but not to talk on the phone to him. They
17 discussed Sciandra being in Los Angeles. Bacow said he was going
18 to speak with Giaquinto that evening. COMMITO told Bacow that he
19 had seen Sciandra at 4:00 p.m., so they must have departed after
20 that. COMMITO said there wasn't anybody around when he (COMMITO)
21 was with him (Sciandra). Bacow said that they must have hit when
22 they landed in Los Angeles. COMMITO told Bacow to have Giaquinto
23 contact him.

24 96. At 8:37 p.m., on August 31, 1987, ANGELO COMMITO received
25 a call from Marty Bacow. Bacow told COMMITO that he was having
26 trouble getting in touch with Giaquinto. Bacow asked COMMITO about

instrument is a true and correct copy
of the original on file in my office
ATTEST:

WILLIAM L. WHITTAKER
Clerk, U. S. District Court
Northern District of California

By *Betty Tai*
Deputy Clerk

Dated DEC 9 1988